Primeflight Aviation Services, Inc. *and* Service Employees International Union, Local 32BJ. Case 29−RC−198504

January 31, 2019

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

The issue in this case is whether the Employer's operations at LaGuardia Airport (LGA) are subject to the Railway Labor Act (RLA) or to the National Labor Relations Act (the Act). The Regional Director concluded that the Employer's LGA operations are subject to the Act and directed an election. In so doing, the Regional Director relied upon the National Mediation Board (NMB)'s post-2013 decisions that the United States Court of Appeals for the District of Columbia recently criticized as an unexplained departure from longstanding NMB precedent. See *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017). Thereafter, in accordance with Section 102.67 of the National Labor Relations Board (Board)'s Rules and Regulations, the Employer filed a timely request for review. The Board subsequently referred several cases, including this case, to the NMB for further consideration in light of the D.C. Circuit's decision. On February 26, 2018, the NMB issued an advisory opinion in *ABM Onsite* overruling the recent decisions criticized by the D.C. Circuit. On August 22, 2018, the NMB issued an advisory opinion stating its view that the Employer's LGA operations are subject to the RLA.

The Board has delegated its authority in this proceeding to a three-member panel.

For the reasons discussed below, we agree with the NMB that the Employer's LGA operations are subject to the RLA. We therefore grant the Employer's request for review, dismiss the petition, and vacate the Union's certification.

Background

Section 2(2) of the Act provides that the term "employer" shall not include "any person subject to the Railway Labor Act." 29 U.S.C. § 152(2). Similarly, Section 2(3) of the Act provides that the term "employee" does not include "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. § 152(3). The RLA, as amended, applies to

> every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner or rendition of his service.

45 U.S.C. § 151 First and 181.

When an employer is not itself a carrier, the NMB applies a two-part test to determine whether it nonetheless has jurisdiction over that employer. First, the NMB considers whether the work the employer performs is traditionally performed by carrier employees. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. Both parts of the test must be met for the NMB to assert jurisdiction. In determining whether the second part of the test is satisfied, the NMB has traditionally considered six factors: (1) the extent of the carrier's control over the manner in which the company conducts its business, (2) the carrier's access to the company's operations and records, (3) the carrier's role in personnel decisions, (4) the degree of carrier supervision of the company's employees, (5) whether company employees are held out to the public as carrier employees, and (6) the extent of carrier control over employee training. See, e.g., *Air Serv Corp.*, 33 NMB 272, 285 (2006).

In 2013, the NMB began emphasizing the third of these six factors, carrier control over personnel decisions (particularly discipline and discharge), and it issued a number of advisory opinions declining to assert jurisdiction where such evidence was lacking. See, e.g., *Huntleigh USA Corp.*, 40 NMB 130, 137 (2013). The Board essentially followed suit, in light of its policy to grant "substantial deference" to NMB advisory opinions regarding RLA jurisdiction.[1] Thus, the Board asserted jurisdiction in cases where the NMB declined to do so under its rebalanced test. See, e.g., *Airway Cleaners, LLC*, 362 NLRB No. 87, slip op. at 1 fn. 2 (2015). In addition, consistent with its longstanding practice, the Board asserted jurisdiction, without referral, in cases that were factually similar to cases in which the NMB had declined jurisdiction.[2] See, e.g., *Allied Aviation Service Co. of New Jersey*, 362 NLRB No. 173, slip op. at 1 (2015), enfd. 854 F.3d 55 (D.C. Cir. 2017), cert. denied 138 S. Ct. 458 (2017).

[1] See, e.g., *DHL Worldwide Express*, 340 NLRB 1034, 1034 (2003).

[2] See *Spartan Aviation Industries*, 337 NLRB 708, 708 (2002) ("[T]he Board . . . will not refer a case that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction.").

Procedural History

On March 7, 2017, the United States Court of Appeals for the District of Columbia issued its decision in *ABM Onsite Services-West, Inc. v. NLRB*, above, which criticized the post-2013 NMB cases as an unexplained departure from longstanding NMB precedent applying the NMB's six factor test for determining carrier control over non-carrier employers. 849 F.3d at 1144−1146. In remanding the case, the court instructed the Board to either "attempt to offer its own reasoned explanation" for the NMB's departure from precedent or to refer the matter to the NMB for an explanation of its change of course. Id. at 1147. On remand, the Board referred the case to the NMB for an advisory opinion regarding whether ABM's operations are subject to the RLA.

On May 10, 2017, the Petitioner filed a petition seeking to represent a unit of all full-time and regular part-time employees employed by the Employer at LGA. The Employer argued that the petition should be dismissed, reasoning that it is controlled by common air carriers subject to the jurisdiction of the RLA, including American Airlines, Air Canada, Southwest Airlines, JetBlue Airways, Frontier Airlines, Spirit Airlines, and US Airways, and therefore, the Board lacks jurisdiction under Section 2(2) of the Act. The Petitioner contended that the Employer is not directly or indirectly controlled by common air carriers subject to the RLA, and therefore, the Board has jurisdiction. After a hearing, the Regional Director issued a Decision and Direction of Election on July 5, 2017, asserting jurisdiction based on her finding that the common air carriers do not exercise meaningful control over the Employer. In so finding, the Regional Director relied upon and emphasized the post-2013 NMB cases that were criticized by the D.C. Circuit in *ABM Onsite Services-West*. Thereafter, the Employer filed a timely request for review, and the Petitioner filed an opposition.

On November 14, 2017, the Board requested that the NMB study the record in this case in light of the D.C. Circuit's decision in *ABM Onsite Services-West* and determine the applicability of the RLA to the Employer's operations at LGA.

On February 26, 2018, the NMB issued an advisory opinion in *ABM Onsite Services*, reaffirming its traditional six-factor carrier control test in which "[n]o one factor is elevated above all others" and overruled cases—including those relied upon by the Regional Director in her Decision and Direction of Election—requiring carrier control over personnel decisions. *ABM-Onsite Services*, 45 NMB 27, 34−35 fn. 2 (2018). Consistent with the Board's policy of giving substantial deference to NMB's advisory opinions, the Board deferred to the NMB's opinion applying the traditional six-factor carrier control test, finding that it was supported by the record in that case. *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35 (2018). On August 22, 2018, the NMB issued an advisory opinion in which it applied its traditional six-factor carrier control test and found that the Employer's operations at LGA are subject to the RLA. *PrimeFlight Aviation*, 45 NMB 140 (2018).

In light of the NMB's decision to overrule cases the Regional Director relied upon in asserting Board jurisdiction and the NMB's advisory opinion asserting its jurisdiction over the Employer's LGA operations, we grant the Employer's Request for Review of the Regional Director's Decision and Direction of Election as it raises substantial issues warranting review.

Discussion

Having received the NMB's advisory opinion, we will give it the substantial deference the Board ordinarily accords such opinions. See *DHL Worldwide Express*, above. Considering the record in light of the NMB's opinion, we find that the Employer's full-time and regular part-time employees employed at LGA perform work that has traditionally been performed by air carrier employees, and that the carriers exercise substantial control over the Employer's LGA operations under the NMB's traditional six-factor carrier control test.

Under the first factor of the carrier control test, the record supports the NMB's determination that the carriers control the manner in which the Employer conducts its business, supporting RLA jurisdiction. The carriers' schedules dictate the scheduling of the Employer's employees. The Employer adjusts its scheduling based on carrier needs and requests, such as creating a new schedule and asking for volunteers when a carrier requested extra baggage handlers and wheelchair assistants over a busy weekend, or keeping employees at home when a carrier plane was grounded due to a snow storm. Furthermore, certain carriers provide the Employer with office space and equipment and allow the Employer's employees to utilize some of their break rooms and lockers. And at least one carrier—JetBlue—requires the Employer to provide electronic tracking for all of its wheelchairs and to allow JetBlue to access and audit such tracking.

There is also evidentiary support for the NMB's determination that the second carrier control factor weighs in favor of RLA jurisdiction because the carriers have access to the Employer's operations and records. The Employer's contracts with the carriers require the Employer to maintain records relating to training, service, and billing, and allow the carriers to audit these records. For example, JetBlue can request certain personnel-related records from the Employer and conduct "Quality Assurance Inspections," while Southwest requires notification about any security-related breach and allows Southwest to

thereafter perform an audit. As previously indicated, JetBlue also requires the Employer to track its wheelchairs and customer complaints.

The record also supports the NMB's determination that the third carrier control factor, the carriers' role in personnel decisions, supports a finding of RLA jurisdiction. The carriers reserve the right to request that any of the Employer's employees be removed from servicing the carrier in question due to misconduct. On one occasion, a carrier requested that a particular employee no longer provide services for that carrier. In response, the Employer undertook an independent investigation, and then the employee was terminated, due to both the misconduct and the fact that the employee had not yet completed her probationary period.

We further find that the record supports the NMB's determinations that two of the other carrier control factors—carrier control over employee training and whether the Employer's employees are held out to the public as carrier employees—favor a finding of RLA jurisdiction.[3] With respect to carrier control over training, the record indicates that JetBlue and Southwest train some of the trainers who then, in turn, train some of the Employer's employees, a circumstance the NMB has long found significant. See, e.g., *Bradley Pacific Aviation, Inc.*, 34 NMB 119, 131 (2007). Southwest also pays for the costs of training a supervisor for the Southwest-related training program. In addition, the Employer's employees may be required to complete some carrier-specific training modules, which may be either written or computer-based. With respect to whether the Employer's employees are held out to the public as carrier employees, the record indicates that some of the Employer's employees who work for American, including baggage service agents, priority parcel employees, and wayfinders, wear either American uniforms or, in the case of the wayfarers, yellow vests with an American logo over the Employer's uniform.

Finally, we observe that under its six-factor carrier control test, the NMB previously found the Employer's LGA operations to be subject to the RLA based on many of the factors that were present in this case. See *PrimeFlight Aviation Services, Inc.*, 34 NMB 175 (2007).[4]

In sum, the record supports the NMB's finding that evidence bearing on five of the six traditional carrier control factors establishes that the Employer is controlled by the carriers, and this finding is consistent with prior NMB precedent. Therefore, we agree with the NMB's determination that the carriers exercise sufficient control over the Employer's LGA operations to establish RLA jurisdiction. Accordingly, we shall vacate the certification and dismiss the petition.[5]

ORDER

IT IS ORDERED that the certification of representative issued August 1, 2017, is vacated and the petition is dismissed.

Dated, Washington, D.C. January 31, 2019

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John F. Ring, Chairman

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

For the reasons stated in my dissenting opinion in *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35, slip op. at 3-5 (2018), I believe that the National Mediation Board adopted its current jurisdictional test without engaging in the reasoned decision-making required by the Administrative Procedure Act, making only a passing reference indicating it was "[m]indful of its statutory mission." 45 NMB No. 12 at 34−35. In so doing, it overruled the approach of its more recent line of "carrier control" cases in only a footnote and returned to the approach of what it called its "traditional jurisdiction test" without explaining why it chose one line of precedent rather than the other. In particular, the NMB failed to address the dissenting arguments of NMB Member Puchala, who also has dissented here. Instead of deferring to the NMB's jurisdictional determination as it did in *ABM Onsite*, supra, the Board should refer this case to the NMB again, so that agency may provide a sufficient explanation of its decision either to adopt the jurisdictional test applied here or to adhere to its prior test. As it stands, neither the NMB, nor the Board, have satisfied the APA's requirements. Accordingly, I dissent.

[3] The remaining factor—the degree of carrier supervision of the Employer's employees—does not support RLA jurisdiction.

[4] A two-member Board deferred to the NMB's opinion that the Employer was subject to the RLA. *PrimeFlight Aviation Services Inc.*, 353 NLRB 467 (2008).

[5] Our dissenting colleague, relying on her dissent in *ABM Onsite Services-West, Inc.*, above, slip op. at 3−5, would not defer to the NMB's advisory opinion based on her belief that the NMB in *ABM-Onsite Services* failed to provide a reasoned explanation for its reaffirmation of the traditional six-factor carrier control test. We disagree with that view for the reasons stated by the majority in *ABM Onsite Services-West, Inc.*, above, slip op. at 2 fn. 5. Accordingly, we reject our dissenting colleague's view that we should refer this case to the NMB again.

Dated, Washington, D.C. January 31, 2019

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Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD